STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No.
Court of Appeals No. 331499
Circuit Court No.15-004596-FC

V

DAWN DIXON-BEY,

Defendant-Appellee.

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APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT OF THE QUESTION PRESENTED

Where the trial court concluded that defendant "brutally murdered in cold blood," is 35-70 years for second-degree murder disproportionately high?

Defendant-Appellant answers:	**Yes**
Plaintiff-Appellee answers:	**No**

STATEMENT OF FACTS

On December 9, 2015, a jury convicted defendant of second-degree murder. MCL 750.316. Subsequently, Jackson County Circuit Court Judge John McBain sentenced her to 35-70 years. Then, on September 26, 2017, in a published 2-1 opinion, the Court of Appeals remanded for resentencing (while affirming the conviction).

The Court of Appeals succinctly summarized the facts as follows:

> Defendant, Dawn Marie Dixon-Bey, was arrested after admittedly stabbing her boyfriend, Gregory Stack, to death in her home on February 14, 2015. At first, she claimed that the victim must have been stabbed during an altercation with others before returning to their home. Later, however, defendant admitted that she was the person who stabbed the victim but claimed that she did so in self-defense. (P 1).

Jackson City Police Officer Gary Kingston testified that defendant had denied that she and the victim had been fighting. (December 1, 2015, Trial Transcript [TrII], p 45).

Sherry Heim testified that, about two or three days after defendant got out of jail, defendant told her that the victim had hit her with the dog cage and had thrown her over her grand babies. (TrII, p 131). In addition, Heim testified that the drinking and drug taking were mutual between defendant and the victim. (TrII, p 148). Later, George Wilson testified that defendant had said that throwing the dog cage had caused her to kill the victim as she had had enough. (TrII, 218). Ryan Wilson also testified that defendant had said that she had had enough and therefore killed him. (December 2, 2015, Trial Transcript [TrIII], P 71).

Dr. Rubén Ortiz-Reyes testified that the victim had two stabs to his heart, about one inch apart. (TrIII, pp 8, 11). Both wounds had been sutured. (TrIII, p 11). The wounds were four inches deep. (TrIII, p 13). Although he could not necessarily rule out that the second wound had

been caused by the surgeons, he did not believe that it had happened that way. (TrIII, pp 25, 27, 56).

Megan Marshall, defendant's daughter, testified that defendant had said that the victim had come home drunk and violent. When he cornered defendant, she picked up a knife and he lunged at her. (TrIII, p 91). Marshall also said that she had not seen the victim, her father, violent—just loud and obnoxious. (TrIII, p 118). Specifically, she has not seen him violent toward defendant. (TrIII, p 119). Sean Pierce also testified that he never saw the victim get physical when he drank, just argumentative. (TrIII, pp 156-158). Jeffrey Tobin also testified that the victim was not physical when he drank. (TrIII, pp 166-167).

Thomas Gore testified that defendant had once said that all that she needs to do is stick a knife in the victim's chest and then claim self-defense. (TrIII, p 187). Sometime around 2003, defendant had said that she would one day kill the victim. (TrIII, p 188). Richard Peterson also testified that defendant had a number of times threatened to stab the victim. (December 3, 2015, Trial Transcript [TrIV], p 16). The victim was not the one to start the fights. (TrIV, p 20).

Defendant testified that she had no explanation for why she had told Brian Pierucki that the victim had been attacked and stabbed on his way home. (December 7, 2015, Trial Transcript [TrVI], p 157). She also said that she continued telling the police the story about the stabbing on the way home even after learning that he was dead, simply because she had already started with the story and decided to stick with it. (TrVI, p 160). She also denied having previously stabbed the victim. (TrVI, p 178). Last, she said that she did nothing with the knife afterwards other than set it down. (TrVI, pp 179-180).

In rebuttal, Marshall testified that defendant had admitted stabbing the victim when they had first started dating. (December 8, 2015, Trial Transcript, p 47).

ARGUMENT

Because, as the trial court concluded, defendant "brutally murdered in cold blood," 35-70 years for second-degree murder is not disproportionately high.

Because the sentencing court (which presided over the trial) had every right to conclude that defendant had committed a first-degree murder (with a mandatory non-parolable-life sentence), 35-70 years is not disproportionately high. The facts are there. Defendant, who had stabbed the victim in the past, stabbed him twice in the heart (after having said that she would one day stab him and claim self-defense). Then, not only did she dispose of the murder weapon, but she lied to the police about what had happened. In addition, the Court of Appeals majority's reasoning tying proportionality to the guidelines comes too close to making the guidelines mandatory. The sentencing court did not abuse its discretion in giving this sentence.[1]

The Court of Appeals majority made two fundamental mistakes in its analysis. First, it ignored the rule from such cases as *People v Ewing (After Remand)*, 435 Mich 443, 446, 462; 458 NW2d 880 (1990), *United States v Watts*, 519 US 148, 152; 117 S Ct 633; 136 L Ed 2d 554 (1997), and *United States v White*, 551 F3d 381, 386 (CA 6, 2008), cert den 556 US 1215; 129 S Ct 2071; 173 L Ed 2d 1147 (2009), that, in aggravating a defendant's sentence, a judge may consider the facts underlying an acquittal. In the present case, the sentencing court did just that. In concluding that defendant had "brutally murdered [the victim] in cold blood," (Sentence Transcript [STr], p 19), it noted that (1) defendant had twice stabbed the victim in the heart (STr, p 18), (2) about 1 ½ years earlier she had slashed him requiring reconstructive surgery (STr, p 18), (3) she had months earlier told someone that she would someday stab the

[1] This Court reviews sentence proportionality for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, ; NW2d (2017).

victim and claim self-defense (STr, p 18), and (4) the knife disappeared after the stabbing (STr, pp 18-19).

Simply put, if the sentencing court is allowed to consider what crime the defendant actually committed, proportionality analysis should consider the crime committed and not the crime that the jury found beyond a reasonable doubt.[2] In assessing proportionality, the judge gets to consider the entire picture. Here, as *Ewing (After Remand)* allows, the judge concluded that defendant really committed a first-degree murder (which mandates non-parolable life). Yet, the majority ignored this ruling and analyzed the case as if what defendant really did was irrelevant. Thus, its analysis in effect overrules *Ewing (After Remand)*.

Further, in deciding that defendant had really committed a first-degree murder, rather than a second-degree murder, the trial court, of course, made a factual finding. The Court of Appeals majority did not find that this factual finding is in any way clearly erroneous. Instead, it just ignored it.

Second, by tying proportionality so much into the guidelines, the Court of Appeals has, at the very least, come very close to making the guidelines mandatory. The United States Supreme Court recognized this problem in two cases where it reversed the circuit courts' having looked at the guidelines in finding the sentence (which deviated from the guidelines) to be unreasonable. In *Kimbrough v United States*, 552 US 85; 128 S Ct 558; 169 L Ed 2d 481 (2007), the guideline range was 228-290 months. Based on disagreeing with the 100-1 powder-to-crack ratio, the judge gave only 180 months. The Fourth Circuit remanded for resentencing

[2] As it is, this rule has existed for plea bargains for over 25 years. *People v Brzezinski (After Remand)*, 196 Mich App 253; 492 NW2d 781, 783 (1992), lv den 442 Mich 898; 502 NW2d 42 (1993).

saying that going outside the guidelines was unreasonable based solely on disagreeing with the guidelines. In reversing the Fourth Circuit, the Supreme Court pointed out that the federal guidelines were by then advisory only. 552 US 101. The guidelines are merely the starting point and the initial benchmark. 552 US 108. As it is, the judge is in a superior position and has a greater familiarity with the case than does either the sentencing commission or the appellate courts. 552 US 109.[3] Although the sentence was 4 ½ years below the guidelines, the sentence was not unreasonable as the judge had honed in on the defendant's particular circumstances. 552 US 111.

In *Gall v United States*, 552 US 538; 128 S Ct 586; 169 L Ed 2d 445 (2007), the judge gave 36 months probation despite a 30-37-month range. The Eighth Circuit reversed finding a 100% downward departure is unreasonable because it is not supported by extraordinary circumstances. The Supreme Court, on the other hand, reiterated that the guidelines are now advisory. Review is limited to only what is "reasonable." 552 US 46. Extraordinary circumstances are not required. 552 US 47. Thus, "the approaches we reject come too close to creating a presumption of unreasonableness for sentences outside the guidelines range." *Id*. No heightened review standard exists for sentences outside the guidelines. 552 US 49. The standard is abuse of discretion either way.

Further, in tying proportionality review so much to the guidelines, the majority missed that the legal landscape has materially changed since *People v Milbourn*, 435 Mich 630; 461

[3] This analysis tracks far better the dissent's position than the majority's.

NW2d 1 (1990). Back then, no one could have imagined that mandatory guidelines would one day be ruled to be unconstitutional.[4]

In the end, the requirement that a larger deviation requires more of a reason than does a smaller deviation was met in the present case. As the law allowed, the sentencing court factually found (by a preponderance) that defendant had committed a first-degree murder. Under any standard, these facts justify the upward deviation. The 35-70-year sentence is proportionate.

Therefore, at the very least, this case fits within this Court's priorities. It has never either (1) looked at how cases like *Ewing (After Remand)* fit into proportionality analysis or (2) defined just what proportionality means given that mandatory guidelines are now unconstitutional. How this Court decides these issues will impact a very large number of sentencings. MCR 7.203(B)(3). The more proportionality analysis is tied to the guidelines, the more sentencing courts will not exercise their discretion to not apply the guidelines, the more (in reality) the guidelines will become mandatory. However this Court rules, it should at least make the decision one way or another.

[4] As it is, the Court of Appeals majority seems to have also missed that *Steanhouse*, *supra*, cited *Milbourn* for only its statements that the sentence is proportionate to how serious the crime is and did not cite it for any statement about tying proportionality analysis into the guidelines themselves.

RELIEF

ACCORDINGLY, plaintiff asks this Court to grant leave to appeal and reverse reinstating the sentence.

Dated: November 9, 2017

Respectfully submitted,

/S/ Jerrold Schrotenboer
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PROOF OF SERVICE

The undersigned certifies that this document was served upon:

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By first class mail and/or truefiling. I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: November 9, 2017

/s/ Brooke Slusher
BROOKE SLUSHER
LEGAL SECRETARY